SOUTHERN UNION CO.

IBLA 81-182 Decided November 25, 1981

Appeal from decision of the New Mexico State Office, Bureau of Land Management, denying appellant's petition for reinstatement of oil and gas leases NM 14237, NM 14238, and NM 14239.

Affirmed.

1. Oil and Gas Leases: Rentals -- Oil and Gas Leases: Subsurface Storage -- Oil and Gas Leases: Termination

   An oil and gas lease embracing lands committed to a subsurface storage agreement, but on which there is no production, terminates by operation of law when the annual rental payment is not timely made.

2. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination

   The Secretary may reinstate a lease terminated by operation of law for failure to pay on or before the anniversary date the full amount of rental due where it is shown to the satisfaction of the Secretary that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976). Reasonable diligence normally requires sending or delivering payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. 43 CFR 3108.2-1(c)(2).

3. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

In order for a failure to pay rental timely to be justifiable, the late payment must be caused by factors outside of lessee's control which were the proximate cause of the failure. Breakdowns in lessee's procedures for handling rental payments resulting from internal changes in lessee's operations do not establish justification for a late rental payment.

APPEARANCES: Thomas B. Carter, Esq., for appellant; John H. Harrington, Office of the Field Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Southern Union Company (Southern) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated November 18, 1980, which denied its reinstatement petitions for oil and gas leases NM 14237, NM 14238, and NM 14239. These oil and gas leases terminated automatically under the provisions of statute, 30 U.S.C. § 188 (1976), because the lessee failed to pay the annual rental on or before September 1, 1980, 1/ the anniversary date of the leases. Annual rental was not received by BLM until September 15, 1980.

The leases were issued to Hoover H. Wright effective September 1, 1971, and assigned to the Southern Union Gas Company with the approval of BLM effective October 1, 1971. On September 25, 1978, BLM issued a decision which recognized appellant's corporate name change from Southern Union Gas Company to Southern Union Company.

Subsequent to receipt of a notice of termination for the subject leases, appellant filed a petition for reinstatement of the leases with BLM on October 22, 1980. That petition contained the same reasons and arguments as appellant's statement of reasons for appeal filed with the Board. Appellant asserts that lands within the leases have been committed to a subsurface gas storage agreement and that termination would be contrary to the terms of 30 U.S.C. § 226(j) (1976) which provides for the extension of such leases for the period of storage. It is alleged that the automatic termination provision for late payment of rental under 30 U.S.C. § 188(b) (1976) does not apply in such circumstances. Furthermore, appellant alleges that the late payment was

1/ As Sept. 1, 1980, was a legal holiday on which the office was closed, payment received on Sept. 2 would have been considered timely. 43 CFR 3108.2-1(a).

either justifiable or not due to a lack of reasonable diligence and that therefore the leases should be reinstated under the terms of 30 U.S.C. § 188(c).

Counsel for appellant elaborates on the basis of the argument that the leases did not terminate for failure to pay the rental timely as follows:

> After acquiring the leases in question and others, Southern Union Gas Company (now Southern Union Company referred to herein as "appellant") executed with the United States of America (hereinafter referred to as the "United States") on January 1, 1973, an Agreement for the Subsurface Storage of Gas, U.S.G.S. number 14-08-0001-12395, GS Lease 1181 (hereinafter referred to as the "Agreement"). The leases in question and others were included in the "gas storage reservoir area" encompassed by the Agreement. Said Agreement remains in full force and effect and exclusively authorizes Appellant to inject, store and take gas, and to enter upon the surface of the gas storage reservoir area for such purposes. Subsequent to the execution of said Agreement, Appellant has entered upon said gas storage reservoir area, drilled some twelve (12) wells, injected a substantial amount of gas, paid an annual storage fee of $ 6,360 and paid additional quarterly storage fees.

If the leases are held to have terminated, appellant contends that the late rental payment was justifiable or not due to a lack of reasonable diligence:

> Appellant submits that its standard operating procedure used in paying its annual rentals is reasonable. Said procedure was to rely on a "tickler" file and/or the "Notice of Payment Due" sent by the BLM to trigger the annual rental payment process. This procedure would have worked but for extenuating circumstances.
>
> Payment of annual rental fees had been handled by Southern Union Exploration Company (hereinafter referred to as "SX") until the spring of 1980. At that time, SX moved out of the home office, leaving behind many duties which they had previously handled for Appellant. The responsibility for paying the rental fees on the leases in question was eventually assigned to Appellant's Gas Supply Division. The confusion caused by the move coupled with an extraordinary high turnover rate in the Gas Supply Division caused the "tickler" file to be temporarily overlooked.
>
> The "Notice of Payment Due" on the leases in question did not reach the Gas Supply Division until after the payment

was due. To the best of my knowledge and belief, the Notice of Payment Due was routed from the general corporate mail room, to the Tax Department, to the Engineering Department and finally to the Gas Supply Division. Checks were cut and payment was placed in the mail almost immediately thereafter.

The Field Solicitor filed an answer on behalf of BLM to appellant's statement of reasons. The Field Solicitor moved for a summary dismissal of the appeal on the ground that appellant failed to serve its office timely pursuant to 43 CFR 4.413. Dismissal of an appeal is discretionary in such a case, and in the absence of a showing of prejudice, which has not been made in this case, the appeal will not be dismissed.

The Secretary of the Interior is authorized by statute to enter into agreements for the subsurface storage of oil or gas in lands leased or subject to lease under the Mineral Lands Leasing Act, as amended, 30 U.S.C. §§ 181-287 (1976 and Supp. II 1978), for the purposes of avoiding waste or conserving natural resources. 30 U.S.C. § 226(j) (1976). The term of any lease on which such storage is authorized is subject to extension for the period of storage. 30 U.S.C. § 226(j).

However, it is provided by statute that "upon failure of lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * *." 30 U.S.C. § 188(b) (1976). The first issue raised by this appeal is whether an oil and gas lease embracing lands devoted to a subsurface gas storage agreement authorized by the Secretary of the Interior which lease is subject to extension for the duration of the agreement pursuant to 30 U.S.C. § 226(j) (1976), terminates automatically under 30 U.S.C. § 188(b) upon failure of the lessee to pay the annual rental by the anniversary date of the lease.

[1] This Board has previously considered the question and held that although a subsurface storage agreement may amend the term of an oil and gas lease, it does not alter the obligation to make the annual rental payments upon which the continued existence of the lease is conditioned. Thus, in the absence of production on the leasehold, 2/

2/ Although appellant alleges that it has entered upon the gas storage area, drilled 12 wells, and injected a substantial amount of gas, the subject leases have remained in a rental status rather than a royalty status. In the event of production on the subject leases, the lease account would be converted from a rental to a royalty basis. See 43 CFR 3103.3-4 and 3103.3-5. Thus, there is no showing of a "well capable of producing oil or gas in paying quantities," so as to exclude these leases from termination under 30 U.S.C. § 188(b) (1976).

the lease terminates automatically by operation of law when the annual rental payment is not timely made. Texas Eastern Transmission Corp., 14 IBLA 361 (1974); see American Natural Gas Production Co., 49 IBLA 230, 232 (1980). It must be noted that any new lease issued for lands devoted to the subsurface storage agreement would be subject to rights of appellant under the storage agreement, including the right to the gas stored pursuant thereto. Texas Eastern Transmission Corp., supra at 367. This is consistent with the terms of appellant's storage agreement. Section 5 of the agreement recognizes both the right of appellant to relinquish leases covering lands within the gas storage area and the right of the Department to issue leases for such lands subject to the condition that the gas storage formation shall be excluded from any such new lease and that all operations thereon shall be conducted in a manner which will prevent the loss of gas from the storage formation.

[2] Appellant further alleges that "the late payment of the annual rental fee on the leases in question was justifiable and not due to lack of reasonable diligence," and that therefore, it meets the requirements for reinstatement of the leases pursuant to 30 U.S.C. § 188(c) (1976). Thus, we must consider whether the "justifiable" and "due diligence" requirements of the statute were met by appellant. Appellant submits that its standard operating procedure used in paying its annual rentals is reasonable. Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c)(2). Here, appellant's payment was not sent until almost 2 weeks after the due date. Mailing the payment after it is due does not constitute reasonable diligence. Gilbert Mark Castillo, 36 IBLA 32 (1978); Appostolos Paliombeis, 30 IBLA 153 (1977); Bobbie Arnold, 24 IBLA 352 (1976).

[3] Similarly, the fact that appellant has business procedures which normally insure prompt rental payments does not establish that it exercised reasonable diligence in a particular case. Melbourne Concept Profit Sharing Trust, 46 IBLA 87 (1980); Fuel Resources Development Co., 43 IBLA 19, 21 (1979); Phillips Petroleum Co., 29 IBLA 114, 117 (1977). The physical move of the part of appellant's company responsible for mailing the late payments, coupled with a high turnover rate in that division and the fact that the responsibility to mail the rental payments was newly assumed, cannot be held to justify late payment. In order for the failure to pay rental timely to be justifiable, the failure must be caused by factors outside the lessee's control which were the proximate cause of the late payment. Robert H. Schnurbusch, 44 IBLA 229 (1979); Emma Pace, 35 IBLA 143 (1978). The Board has held repeatedly that a lessee may not rely upon the bulk and/or complexity of its business organization to make "justifiable" an action which would not be held to be justifiable for an individual lessee. Fuel

Resources Development Co., supra at 23; Mono Power Co., 28 IBLA 289, 291 (1976); see Ram Petroleums, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981). Appellant is ultimately in control of and is responsible for the performance of its employees. Melbourne Concept Profit Sharing Trust, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge